Supreme Court, U.S.
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No. 93-

Supreme Court of the United States

October Term 1993

Raymond Ternes, Petitioner,

v.

Karreen D. Berchard(f/k/a Ternes); Rosemarie Warren Lemoine, attorney; Jamie N. Johnson, deputy prosecuting attorney; Harry R. Slusher, family court commissioner; and The County of King of the State of Washington; Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IV. Decision Below

The memorandum below is not yet noted in the Federal Reporter.

V. Statement of Grounds for Jurisdiction of this Court

The order below was filed by the court of appeals on December 22, 1993. This Petition for Writ of Certiorari is presented within 90 days of the memorandum decision.
This Court has jurisdiction to review this decision provided by 28 U.S.C. §1254(1).

VI. Laws Involved in this Case

Fifth Article of Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

VII. Statement of the Case

On August 20, 1992, the respondents Berchard and Lemoine obtained an Order of Child Support against Mr. Ternes in King County Superior Court, *In re Marriage of Ternes*, No. 88-3-05254-2.

On May 20, 1993, a Motion for an Order to Show Cause re Contempt and an Order to Show Cause re Contempt were obtained by the respondents Johnson and King County from respondent Slusher. Same case as noted above.

On July 14, 1993, Mr. Ternes filed his Complaint in the United States District Court for the Western District of Washington, No. C93-944R, alleging that the child support order and the contempt prosecution are actions under color of state law that deprive him of his federal rights. District court had subject matter jurisdiction provided by 43 U.S.C. §1983, 28 U.S.C. §1331, and 28 U.S.C. §1343(a)(3) and (4).

On September 9, 1993, the district court dismissed the case and awarded sanctions and attorney's fees to respondents Berchard and Lemoine. App. pp. 2-5.

On September 24, 1993, Mr. Ternes appealed to the Ninth Circuit Court of Appeals, No. 93-35913. The court of appeals had jurisdiction under 28 U.S.C. §1291.

On December 22, 1993, the court of appeals filed the order granting summary affirmance. App. p. 1.

VIII. Argument for the Allowance of the Writ

In its order granting summary affirmance, App. p. 1, the court of appeals finds that the questions upon which Mr. Ternes' case depends are so insubstantial as not need further argument, citing *United States v. Hooten*,(CA9 1982) 693 F. 2d. 857, 858. This opinion specifically finds that not every case in which appellant files an unimpressive brief is appropriate for summary affirmance. Motions to affirm should be confined to appeals obviously controlled by precedent and cases in which the insubstantiability is manifest from the face of the appellant's brief. *Id.* at 858.

The only way that the insubstantiability of Mr. Ternes' appeal is manifest from the appellant's brief is in refusing to read it. The "insubstantial" question raised by Mr. Ternes' appeal is as follows:

An order to pay child support under the laws of the State of Washington was imposed on Mr. Ternes. He failed to comply with this order. He was prosecuted for contempt for nonpayment of the support, threatened with arrest and imprisonment under RCW 26.18.050.

These facts were not disputed. The district court took judicial notice of the facts that: Ms. Lemoine is former wife Berchard's attorney in the divorce action in state court, and that Mr. Slusher signed the order to show cause directing Mr. Ternes to appear and show cause he should not be found in contempt of court for failure to pay child support.

See App. p. 3.

In addition to the above described facts, Mr. Ternes alleged that he lacked sufficient wealth to comply with the support order without being employed. Absolutely positively no evidence was presented to the contrary. Construing the facts in favor of the nonmoving party, Mr. Ternes made a more than substantial claim that the child support order and the contempt prosecution are attempts by virtue of state law to hold him in a condition of peonage in violation of his rights secured by 42 U.S.C. §1994 and the Thirteenth Amendment.

The only possible way that Mr. Ternes can be wrong about his claim is if child support is not a "debt or obligation, or otherwise" within the meaning of the Antipeonage Act, 42 U.S.C. §1994, and as originally passed, 14 Stat 546.

Is this issue "obviously controlled by precedent"? If so, it is in Mr. Ternes' favor: Threat of legal coercion proves involuntary servitude, *United States v. Kozminsky*,(1988) 487 U.S. 931, 101 L. Ed. 2d. 788, 108 S. Ct. 2751, 2761. The relevant jury instructions as repeated by this Court:

> "Involuntary servitude involves a condition of having some of the incidents of slavery.
> It may include situations in which persons are returned to employment by law."
> *Id.* at 2775.

A parent may require a child to attend school or to perform chores, but that parent is prohibited by

the Thirteenth Amendment from selling his child into bondage. Our law views the parent and child relationship as one of mutual obligation and mutual respect. The principle of reciprocity that the establishes does not have a place for bondage by parental consent. *United States v. King*,(CA6 1988) 840 F. 2d. 1276, 1283 citing *United States v. Ancarola*,(CCSDNY 1880) 1 F. 676.

Quitting of work cannot be any element of a crime. *Pollack v. Williams*,(1944) 322 U.S. 4, 18, 88 L. Ed. 1427, 64 S. Ct. 792.

Mr. Ternes presented the reasonable argument that as parents are prohibited from selling their children into bondage, likewise, they are prohibited from selling each other into bondage. What they cannot accomplish by contract, they cannot accomplish by court order.

Mr. Ternes also discussed the legislative history of the Antipeonage Act, the system known as peonage in New Mexico Territory, and the considerable discussion of family law by the 38th Congress in the course of presenting to the States the Amendment abolishing slavery.

It is true that there are two cases previously decided by the Ninth Circuit where the threat or fact of contempt proceedings to enforce support were alleged to be involuntary servitude and peonage. *Knight v. Knight, Kafka*,(CA9 1993) No. 92-35173 Memorandum noted 996 F. 2d. 1225, and *Durbin v. Durbin, et. al.*,(CA9 1993) No. 93-35426 Memorandum noted 12 F. 3d. 1106. These two

decisions were not noted for publication. Ninth Circuit Rule 36-3 prohibits the citation of unpublished decisions as precedent.

Even if these cases were precedent, *Knight* is not a valid decision. *Knight* was decided by the same panel that decided *P.O.P.S. v. Gardner*,(CA9 1993) 998 F. 2d. 764. Jerome Farris, who wrote *P.O.P.S.* and *Duranceau v. Wallace*,(CA9 1984) 743 F. 2d. 709, was personally affected by the outcome of *Knight.*

Prior to being appointed to the Ninth Circuit, Judge Farris served in the State of Washington's Court of Appeals, Division One, in Seattle. He concurred in the unpublished decision in *In re Marriage of Vise*,(Wash. App. 1979) No. 6032-1 noted on 22 Wash. App. 1016. This decision affirmed a divorce decree, including its child support order.

After the case was remanded to King County Superior Court, No. D-95585, the support debtor, Donald Ray Vise, was prosecuted for contempt.

If child support is established as a debt or obligation within 42 U.S.C. §1994, then a grand jury could possibly indict Judge Farris for aiding and abetting, 18 U.S.C. §2, a crime of peonage, 18 U.S.C. §1581; and even for conspiracy to deny civil rights while acting under color of state law, 18 U.S.C. §241.

28 U.S.C §455 requires a judge to recuse on his own motion if he knows of such a substantial

personal interest in the outcome of the case before him.

Judge Farris' assumption *arguendo* in *P.O.P.S.* at 998 F. 2d. 767 is clearly influenced by Roger Knight's assertion that child support itself is an irrebuttable presumption regardless of how the level of support is to be set. So *P.O.P.S.* is not a valid decision either.

Therefore, the *Knight* and *Durbin* decisions do not control the outcome of Mr. Ternes' case.

While the Ninth Circuit rules prohibit citations of unpublished decisions as precedent, conflicts between such decisions can call for an exercise of this Court's power of supervision. Circuit Rules do not govern this Court.

Mr. Ternes also appealed an award for sanctions for filing a frivolous action under FRCP 11. In an appeal of a dismissal of an appeal by the Ninth Circuit's Bankruptcy Appellate Panel(BAP), the court of appeals vacated and remanded. It specifically found that because the debtor challenged an award for Rule 11 type sanctions by the bankruptcy court, the appeal was not moot. *In re Knight*,(CA9 1994) No. 92-35515, Memorandum filed on January 5, 1994, not yet noted in the Federal Reporter.

In essence, the court of appeals treated Mr. Ternes in the same manner that the BAP had treated Mr. Knight. This Court should reverse the summary affirmance and remand for the same reason that the court of appeals vacated the BAP's dismissal of Mr.

Knight's case and remanded.

No colorable claim of involuntary servitude and peonage can be considered frivolous. In *Ex parte Todd*,(Cal. 1897) 50 P. 1071, an argument similar to Mr. Ternes' prevailed in the California Supreme Court.

Because peonage is a crime, 18 U.S.C. §1581, and because of the widespread use of contempt to enforce child support orders, such a claim is not likely to get a fair hearing in the state courts today. A conflict of interest exists where judges have used such contempt proceedings to enforce support.

Thus, the abstention doctrine defined in *Younger v. Harris*,(1971) 401 U.S. 37, 27 L. Ed. 2d. 669, 91 S. Ct. 746 fails on its own terms and *Mitchum v. Foster*, (1972) 407 U.S. 225, 32 L.Ed. 2d. 669, 91 S.Ct. 746 controls the question of jurisdiction. 42 U.S.C. §1983 creates a statutory exception to 28 U.S.C. §2283.

Therefore, Mr. Ternes' claim contains legal points that are arguable on their merits. It is not frivolous, see *Neitzke v. Williams*,(1989) 490 U.S. 319, 325, 104 L. Ed. 2d. 338, 109 S. Ct. 1827 citing *Anders v. California*,(1967) 386 U.S. 738, 744, 18 L. Ed. 2d. 493, 87 S. Ct. 1396. The facts alleged do not rise to the irrational or the wholly incredible, see *Denton v. Hernandez*,(1992) 118 L. Ed. 2d. 340, 349-350, 112 S. Ct. 1728.

If Mr. Ternes' complaint and appeal are not frivolous, they are not so insubstantial as not to need

further argument. The district court and court of appeals decisions in this case are in direct conflict with this Court's findings in the above cited cases, constitute a denial of due process, and a miscarriage of justice. As slavery once divided the nation into warring factions, a colorable claim of involuntary servitude and peonage is of the utmost importance.

A writ of certiorari is therefore indicated.

IX. Conclusion

For the reasons stated herein, this petition for writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAYMOND TERNES, Plaintiff-Appellant, v. KARREEN D. BECHARD (f/k/a) Karreen Ternes; JAMIE N. JOHNSON, Dep. Pros. Attorney; HARRY SLUSHER, family court commissioner, et al., Defendants-Appellees.	))))))))	No. 93-35913 D.C. No. C93-944R Washington(Seattle) ORDER

Before: SNEED, NOONAN, and TROTT, Circuit Judges.

Appellees' motion to dismiss this appeal is construed as a motion for summary affirmance. So construed, the motion is granted. It is manifest from the face of appellant's brief that the questions on which the cause depends are so insubstantial as not to need further argument. *See United States v. Hooten*, 693 F. 2d. 857, 858 (9th Cir. 1982) (per curiam). Appellees' request for attorney fees and sanctions is denied.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RAYMOND TERNES, Plaintiff, v. KARREEN D. BERCHARD (f/k/a TERNES); ROSE-MARIE WARREN LEMOINE, Attorney; JAMIE N. JOHNSON, Deputy Prosecuting Attorney; HARRY SLUSHER, Family Court Commissioner; and THE COUNTY OF KING OF THE STATE OF WASHINGTON, Defendants.	)))))))))))))))	NO. C93-944R ORDER DISMISSING COMPLAINT WITH PREJUDICE

THIS MATTER comes before Chief Judge Barbara J. Rothstein on defendants Lemoine and Berchard's motion to dismiss plaintiff Ternes' complaint for failure to state a claim upon which relief can be granted, failure to join an indispensable party, and for lack of jurisdiction over the person and subject matter, and on defendants Deputy Prosecuting Attorney Jamie N. Johnson, King County Family Law Commissioner Harry Slusher, and King County's motion to dismiss. In addition, defendants Lemoine and Bechard have requested

attorney's fees and sanctions against Mr. Ternes.

The court has reviewed the files and pleadings in this matter, the defendants' motions and memoranda, and the documents submitted by Mr. Ternes in opposition to defendants' motions to dismiss. Deeming itself fully advised, the court makes the following findings:

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Plaintiff Raymond Ternes has failed to allege any federal claim against defendant Lemoine, who is former wife Karreen Berchard's attorney in their divorce action in King County Superior Court.

2. Mr. Ternes bases his complaint on allegations that 32(sic) U.S.C. §1994, 18 U.S.C. §1581, and 42 U.S.C. §1983 have been violated because he interprets Washington statutes to require that he be employed in order to support his children. However, Mr. Ternes failed to name the State of Washington as a party to this action, naming instead King County and Deputy Prosecuting Attorney Jamie N. Johnson as parties to this action.

3. Mr. Ternes has named the Family Court commissioner who signed the order to show cause directing Raymond Ternes to appear and show cause why he should not be found in contempt of court for failing to pay child support. Commissioner Slusher is protected from this action because of judicial immunity.

4. Mr. Ternes has named his former wife as a defendant in this action, but has failed to allege

any federal claim against her.

The gravamen of Mr. Ternes' complaint is that his former wife is enforcing the child support order entered in their case. This court has ruled that it will rarely interfere in cases which involve family law. This case does not present issues subject to intervention by the federal courts.

5. Mr. Ternes has failed to raise any allegations which would establish federal jurisdiction over defendants LeMoine or Berchard.

6. This is the second federal court action Mr. Ternes has filed against defendant LeMoine and Berchard. Mr. Ternes filed a federal action against defendant LeMoine in 1992, also based on issues arising out of the Ternes divorce proceedings in King County Superior Court. That action was dismissed by Judge Thomas S. Zilly on June 17, 1992. This action has been brought in violation of Civil Rule 11.

7. Defendant Bechard has incurred attorney's fees in responding to this action. Defendant LeMoine has charged defendant Berchard approximately $750.00 for costs incurred in defending this action. These fees are reasonable. Plaintiff Ternes shall be required to pay these fees.

8. The court finds no federal claim exists to support this complaint against defendants and the complaint must therefore be dismissed.

II. ORDERS

1. Defendants' motions for dismissal of plaintiff's complaint are GRANTED. This action is

dismissed with prejudice.

2. Defendant LeMoine's request for sanctions is GRANTED. Sanctions in the amount of $250.00 are awarded to defendants LeMoine and Berchard.

3. It is further ordered that plaintiff Raymond Ternes shall pay to defendants LeMoine and Berchard $750.00 in attorney's incurred in this action.

DATED at Seattle, Washington this 9th day of September, 1993.

/s/
BARBARA J. ROTHSTEIN
CHIEF UNITED STATES DISTRICT JUDGE